

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDUARDO MENJIVAR, NANA I AM,) No. CV 15-7976 FMO (AS)
)
Plaintiffs,) **REPORT AND RECOMMENDATION OF A**
v.)
)
WELLS FARGO BANK NA, et al.,) **UNITED STATES MAGISTRATE JUDGE**
)
)
Defendants.)
)

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On October 9, 2015, Plaintiffs Eduardo Menjivar and Nana I Am filed a pro se Complaint pursuant to various federal and state laws, including 42 U.S.C. §§ 1981, 1983 and 1985. (Docket Entry No. 1).

1 Plaintiffs named as Defendants: (1) Wells Fargo Bank, NA; (2) Genesis
 2 Capital Master Fund III, LLC; (3) Regional Trustee Service
 3 Corporation; (4) East End Properties, Inc.; (5) Daniel Argento, an
 4 individual associated with East End Properties, Inc.; (6) the Los
 5 Angeles Police Department; and (7) "All Persons Claiming Any Legal or
 6 Equitable Right, Title, Estate, Lien, or Interest in the Property
 7 Described in the Complaint Adverse to Plaintiff's Title, or Any Cloud
 8 On Plaintiff's Title Thereto." (Id. at 1, 7-8).¹ Plaintiffs also
 9 named ten Doe defendants. (Id. at 1, 9). Plaintiffs alleged that
 10 Defendants had publicly recorded fraudulent documents purporting to
 11 convey to Defendants title to or an interest in Plaintiffs' real
 12 property. (Id. at 10).

13
 14 Several of the claims in the Complaint were not cognizable as
 15 pled and, on April 28, 2016, the Court issued an Order Dismissing the
 16 Complaint With Leave To Amend. (Docket Entry No. 8). A First
 17 Amended Complaint was due May 31, 2016.²
 18

19 On July 1, 2016, after Plaintiffs failed to file a First Amended
 20 Complaint, the Court issued an Order to Show Cause why this action
 21 should not be dismissed for failure to prosecute ("OSC"). (Docket
 22 Entry No. 9). Plaintiffs were directed to respond to the OSC or to

23 ¹ For ease of reference, the Court cites the Complaint and its
 24 attached exhibits as though they constitute one continuously paginated
 25 document.

26 ² A First Amended Complaint was due within 30 days of the Court's
 27 order. (Docket Entry No. 8 at 11). Because the deadline set by the
 28 order fell on a Saturday, and May 30, 2016 was Memorial Day, a First
 Amended Complaint was due May 31, 2016. See Fed. R. Civ. P.
 6(a)(1)(C).

1 file a First Amended Complaint no later than July 22, 2016. (Id. at
2). Plaintiffs were warned that failure to timely respond would
3 result in a recommendation that this action be dismissed with
4 prejudice for failure to prosecute and obey court orders. (Id. at
5).

6

7 Plaintiffs have not responded to the OSC, requested an extension
8 of time to do so, or otherwise communicated with the Court. None of
9 the Court's orders have been returned as undeliverable, so Plaintiffs
10 presumably received them when they were issued. Plaintiffs appear to
11 have lost interest in this litigation. Dismissal with prejudice for
12 failure to prosecute and to comply with Court orders is warranted
13 pursuant to Federal Rule of Civil Procedure 41(b).

14

15 **II.**

16 **DISCUSSION**

17

18 Federal Rule of Civil Procedure 41(b) grants district courts the
19 authority to sua sponte dismiss actions for failure to prosecute or
20 failure to comply with court orders. See Link v. Wabash R.R., 370
21 U.S. 626, 629-31 (1962) ("expressly recogniz[ing]" the district
22 court's authority to dismiss an action with prejudice for failure to
23 prosecute, finding that "[t]he power to invoke this sanction is
24 necessary in order to prevent undue delays in the disposition of
25 pending cases and to avoid congestion in the calendars of District
26 Courts."); Pagtalunan v. Galaza, 291 F.3d 639, 640-43 (9th Cir. 2002)
27 (affirming district court's sua sponte dismissal of habeas petition
28 with prejudice "for failure to prosecute and for failure to comply

1 with a court order"). However, because "dismissal is a harsh
2 penalty[,] . . . it should only be imposed in extreme circumstances."
3 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992).

4

5 In considering whether to dismiss an action for failure to
6 comply with a court order, the court must weigh five factors:
7 "(1) the public's interest in expeditious resolution of litigation;
8 (2) the court's need to manage its docket; (3) the risk of prejudice
9 to [the defendants]; (4) the availability of less drastic
10 alternatives; and (5) the public policy favoring disposition of cases
11 on their merits." See Pagtalunan, 291 F.3d at 642 (citing Ferdik,
12 963 F.2d at 1260-61).

13

14 "[The Ninth Circuit] 'may affirm a dismissal where at least four
15 factors support dismissal, . . . or where at least three factors
16 "strongly" support dismissal.'" Yourish v. California Amplifier, 191
17 F.3d 983, 990 (9th Cir. 1999) (quoting Hernandez v. City of El Monte,
18 138 F.3d 393, 399 (9th Cir. 1998)). As set forth below, the Court
19 finds that four of the five factors strongly weigh in favor of
20 dismissal.

21

22 **A. The Five Factors Support Dismissal**

23

24 1. The Public's Interest In Expeditious Resolution Of Litigation

25

26 The Ninth Circuit has explained that "[t]he public's interest in
27 expeditious resolution of litigation always favors dismissal."
28 Pagtalunan, 291 F.3d at 642 (quoting Yourish, 191 F.3d at 990)

1 (internal quotation marks omitted). The fact that Plaintiffs have
2 failed to pursue this case for several months by not filing a First
3 Amended Complaint or responding to the OSC adds even more weight to
4 this factor. See id. ("Given [Plaintiff's] failure to pursue this
5 case for almost four months, this factor weighs in favor of
6 dismissal.").

7

8 2. Court's Need To Manage Its Docket

9

10 Courts have the "power to manage their dockets without being
11 subject to the endless vexatious noncompliance of litigants." See
12 Ferdik, 963 F.3d at 1261. Thus, the second factor focuses on whether
13 a particular case has "consumed . . . time that could have been
14 devoted to other cases on the [court's] docket." See Paqtalunan, 291
15 F.3d at 642.

16

17 The Court issued an Order Dismissing the Complaint With Leave to
18 Amend on April 28, 2016. (Docket Entry No. 8). The order explained
19 the reasons for the Court's finding that Plaintiffs had failed to
20 properly allege a violation of their constitutional rights or state a
21 cause of action, provided guidance regarding the filing of an amended
22 complaint, and granted Plaintiffs an opportunity to amend. (Id. at
23 6-12). Plaintiffs have failed to respond to the Court's order
24 granting leave to file a First Amended Complaint. As a result, the
25 Court remains unaware if or how Plaintiffs intend to proceed with
26 this matter, especially in light of the Court's order setting forth
27 the defects fatal to Plaintiffs' Complaint.

1 Plaintiffs' inaction hinders the Court's ability to move this
 2 case toward disposition and indicates that Plaintiffs do not intend
 3 to litigate this action diligently. The Court expended valuable time
 4 screening Plaintiffs' Complaint and in preparing the Order Dismissing
 5 the Complaint With Leave to Amend. As a result, Plaintiffs' case
 6 has "consumed . . . time that could have been devoted to other cases
 7 on the [court's] docket." See Pagtalunan, 291 F.3d at 642. The
 8 court cannot continue to spend valuable resources attempting to move
 9 forward a case that Plaintiffs do not wish to expeditiously pursue.
 10 Consequently, the Court's need to manage its docket favors dismissal.

11

12 3. The Risk Of Prejudice To Defendants

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14 The third factor - prejudice to the Defendants - also favors
 15 dismissal. "[T]he failure to prosecute diligently is sufficient by
 16 itself to justify a dismissal . . . [t]he law presumes injury from
 17 unreasonable delay." In re Eisen, 31 F.3d 1447, 1452 (9th Cir. 1994)
 18 (quoting Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir.
 19 1976)). Courts presume prejudice when delay is unreasonable because
 20 such "delay inherently increases the risk that witnesses' memories
 21 will fade and evidence will become stale." See Pagtalunan, 291 F.3d
 22 at 642-43 (citing Sibron v. New York, 392 U.S. 40, 57 (1968)).
 23 Moreover, the risk of prejudice to the defendant is related to the
 24 reason given by the plaintiff for failing to prosecute an action. See
 25 Pagtalunan, 291 F.3d at 642 (citing Yourish, 191 F.3d at 991).

26

27 Here, Plaintiffs have failed to respond in any manner to the
 28 Court's orders and have not attempted to advance any explanation for

1 their failure to file a First Amended Complaint. Consequently,
 2 Plaintiffs' delay in prosecuting this case and obeying the Court's
 3 orders is unreasonable, and the risk of prejudice strongly weighs in
 4 favor of dismissal. See Pagtalunan, 291 F.3d at 642-43 (finding
 5 prejudice when "[petitioner] offered no clear explanations of what
 6 actions he actually took during the relevant time periods[,] even
 7 though the respondent had not yet appeared in the action); In re
 8 Phenylpropanolamine Prods. Liab. Litig., 460 F.3d 1217, 1228 (9th Cir.
 9 2006); cf. Yourish, 191 F.3d at 991-92 (finding that "[p]laintiffs'
 10 paltry excuse" for their failure to timely file an amended complaint
 11 demonstrated that there was "sufficient prejudice to [d]efendants from
 12 the delay" such that this factor "strongly favor[ed] dismissal").

13

14 4. Availability Of Less Drastic Alternatives

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16 Less drastic alternatives to dismissal include, inter alia, a
 17 warning to a party that dismissal could result from failure to obey a
 18 court order. See Malone v. U.S. Postal Serv., 833 F.2d 128, 132 n.1
 19 (9th Cir. 1987). To determine whether a district court has properly
 20 considered such alternatives, the Ninth Circuit evaluates three
 21 factors:

22

23 (1) Did the [district] court explicitly discuss the
 24 feasibility of less drastic sanctions and explain why
 25 alternative sanctions would be inadequate? (2) Did the
 26 [district] court implement alternative methods of
 27 sanctioning or curing the malfeasance before ordering
 28 dismissal? (3) Did the court warn the plaintiff of the

1 possibility of dismissal before actually ordering dismissal?

2
3 Id. at 132.

4
5 The Ninth Circuit has explained that "[a] district court need
6 not exhaust every sanction short of dismissal before finally
7 dismissing a case, but must explore possible and meaningful
8 alternatives." Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir.
9 1986). Furthermore, "a district court's warning to a party that his
10 [or her] failure to obey the court's order will result in dismissal
11 can satisfy the 'consideration of alternatives' requirement."
12 Ferdik, 963 F.2d at 1262 (citations omitted).

13
14 In the Order Dismissing the Complaint With Leave To Amend, the
15 Court stated the reasons for dismissal and offered guidance as to how
16 Plaintiffs could cure the Complaint's deficiencies. (Docket Entry
17 No. 8 at 6-10). That order explicitly warned Plaintiffs that the
18 failure to timely file a First Amended Complaint could result in a
19 recommendation that this action be dismissed with prejudice under
20 Federal Rule of Civil Procedure 41(b) for failure to prosecute or
21 failure to comply with court orders. (Id. at 12). Plaintiffs are
22 well aware that their failure to file a First Amended Complaint could
23 result in a recommendation that the action be dismissed with
24 prejudice for failure to prosecute. On this record, the Court finds
25 that Plaintiffs have lost interest in their own lawsuit. Therefore,
26 the Court concludes that less drastic alternatives would be
27 inadequate to remedy Plaintiffs' failure to prosecute and obey court
28 orders.

1 5. Public Policy Favoring Disposition On The Merits

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3 The fifth factor - the public policy favoring the disposition of
 4 cases on their merits - ordinarily weighs against dismissal. See In
5 re Phenylpropanolamine Prods. Liab. Litiq., 460 F.3d at 1228.
 6 However, "this factor 'lends little support' to a party whose
 7 responsibility it is to move a case toward disposition on the merits
 8 but whose conduct impedes progress in that direction." See id.
 9 (citations omitted). This is because "a case that is stalled or
 10 unreasonably delayed by a party's failure to comply with deadlines
 11 . . . cannot move forward toward resolution on the merits." See id.

12

13 Here, Plaintiffs have not discharged their responsibility of
 14 "mov[ing] towards [a] disposition [on the merits] at a reasonable
 15 pace." Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir.
 16 1991). Under these circumstances, the public policy favoring the
 17 resolution of disputes on the merits "lends little support" to
 18 Plaintiffs. See In re Phenylpropanolamine Prods. Liab. Litiq., 460
 19 F.3d at 1228 (internal quotation marks omitted).

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21 **B. Dismissal Of This Action Under Rule 41(b) Is Appropriate**

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23 As discussed supra, four of the Rule 41(b) dismissal factors
 24 strongly weigh in favor of dismissal, whereas only one factor (at
 25 best) slightly weighs against dismissal. Moreover, the Court finds
 26 that Plaintiffs have manifested little to no interest in this action,
 27 which further demonstrates that these proceedings should not
 28 continue. Under these circumstances, dismissal of the action with

1 prejudice is appropriate. See Malone, 833 F.2d at 133 n.2 (public
2 policy favoring disposition of cases on their merits weighed against
3 dismissal, but was "not sufficient to outweigh the other four
4 factors, which in this case support dismissal").

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6 Rule 41(b) states in relevant part:

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8 [D]ismissal under this subdivision (b) and any dismissal not
9 under this rule - except one for lack of jurisdiction,
10 improper venue, or failure to join a party under Rule 19 -
11 operates as an adjudication on the merits.

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13 Fed. R. Civ. P. 41(b).

14

15 The Court recommends dismissal of this action due to Plaintiffs'
16 failure to prosecute and obey court orders. As this case does not
17 fall into one of the three exceptions noted above, the dismissal will
18 operate as an adjudication on the merits. The dismissal will thus be
19 with prejudice to Plaintiffs' refiling of a new complaint based on
20 the same allegations. See Stewart v. U.S. Bancorp, 297 F.3d 953, 956
21 (9th Cir. 2002) (dismissal interpreted as an adjudication on the
merits unless one of the Rule 41(b) exceptions applies); Owens v.
22 Kaiser Health Plan, Inc., 244 F.3d 708, 714 (9th Cir. 2001)
23 (dismissal for failure to prosecute is treated as adjudication on the
merits) (citing United States v. Schimmels, 127 F.3d 875, 884 (9th
Cir. 1997)). Plaintiffs were expressly warned about the possibility
24 of dismissal in the event of their failure to file a First Amended
25 Complaint. Plaintiffs will have the opportunity to file Objections
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1 to this Report and Recommendation if they wish to contest the
2 dismissal of this action.

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4 **III.**

5 **RECOMMENDATION**

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7 It is recommended that the Court issue an Order (1) accepting
8 and adopting this Report and Recommendation; and (2) directing that
9 Judgment be entered dismissing this action with prejudice.

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11 Dated: September 9, 2016.

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13 _____ /s/
14 ALKA SAGAR
United States Magistrate Judge
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